

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BRIAN ZAHN,

Plaintiff,

v.

R.L. BROWNLEE, ACTING  
SECRETARY, DEPARTMENT OF THE  
ARMY,

Defendant.

NO. CV-03-0356-EFS

**ORDER DENYING IN PART AND  
HOLDING IN ABEYANCE IN PART  
PLAINTIFF'S OBJECTIONS TO  
SEPTEMBER 14, 2005 [SIC]  
ORDER AND GRANTING  
DEFENDANT'S MOTION TO DISMISS**

Before the Court, without oral argument, are Plaintiff's Objections to September 14, 2005 [sic] Order (Ct. Rec. 126) and Defendant's Motion to Dismiss Plaintiff's Cause of Action Based on the Fourteenth Amendment (Ct. Rec. 129). Plaintiff objects to several rulings made by the Court in its September 14, 2005, Order Denying Plaintiff's Motion for Judicial Notice and Motion for Discovery, Granting in Part and Denying in Part Plaintiff's Motion for Reconsideration, and Denying as Moot Motions in Limine (Ct. Rec. 125). Defendant opposes Plaintiff's objections, and likewise, Plaintiff opposes Defendant's motion. As explained below, the Court denies in part and holds in abeyance in part Plaintiff's reconsideration motion and grants Defendant's motion.

1 **A. Plaintiff's Objections/Reconsideration**

2 The Court construes Plaintiff's Objections to September 14, 2005  
3 [sic] Order as a motion for reconsideration of the following Court  
4 determinations: (1) Plaintiff's jury demand was untimely, (2) Plaintiff's  
5 forced retirement and hostile working environment claims were untimely,  
6 (3) failure to state a claim for subversion of the arbitration hearing,  
7 (4) denial of Plaintiff's Judicial Notice request, (5) denial of motion  
8 to reopen discovery, (6) ruling of insufficient demonstration of pretext  
9 relative to pay for attendance at arbitration, and (7) dismissal of First  
10 Amendment cause of action because retaliation is a matter of public  
11 concern. Reconsideration is appropriate if the court (1) is presented  
12 with newly discovered evidence, (2) committed clear error or the initial  
13 decision was manifestly unjust, or (3) if there is an intervening change  
14 in controlling law. See *All Hawaii Tours, Corp. v. Polynesian Cultural*  
15 *Ctr.*, 116 F.R.D. 645, 648 (D. Hawaii 1987), *rev'd on other grounds*, 855  
16 F.2d 860 (9th Cir. 1988). As explained below, the Court finds  
17 reconsideration is inappropriate because Plaintiff has not presented  
18 newly discovered evidence, clear error was not committed, the September  
19 14, 2005, decisions were not manifestly unjust, and there was no  
20 intervening change in law.  
21

22 The Court abides by its decision that Plaintiff's demand for jury  
23 was untimely. Plaintiff did indicate his desire for a jury trial on the  
24 civil cover sheet; however, such is not served on opposing counsel and  
25 so it does not comply with Federal Rule of Civil Procedure 38(b). The  
26 Court recognizes the Scheduling Order set this matter for a jury trial;

1 however, this Court action does not alter the fact that Plaintiff's  
2 actual jury demand was untimely. Accordingly, absent a joint stipulation  
3 for a jury trial, a bench trial will be held.

4 In regards to the Court's ruling that Plaintiff's forced retirement  
5 and hostile working environment claims were untimely, the Court does not  
6 find the evidence submitted by Plaintiff or the decisions cited by  
7 Plaintiff, *Roshio v. Henderson*, EEOC DOC 01972548, 1999 WL 202752 (1999),  
8 or *Leorna v. U.S. Department of State*, 105 F.3d 548 (1997), inconsistent  
9 with the Court's ruling. Furthermore, the Court does not find its ruling  
10 that Plaintiff failed to state a cause of action related to his  
11 arbitration subversion claim is erroneous after reviewing the legal  
12 material cited by Plaintiff, including *Ellis v. Frank*, EEOC DOC 05920011,  
13 1992 WL 1374456 (1992).  
14

15 The Court stands by its decision denying Plaintiff's request for  
16 judicial notice. The Court also concludes Plaintiff did not meet his  
17 burden of establishing pretext relative to delayed payment for his  
18 attendance at the arbitration hearing, even with considering the email  
19 sent from Mr. Reynolds to John Skibby (EEOC CD Vol. 2 at 595). In  
20 addition, the Court abides by its dismissal of Plaintiff's First  
21 Amendment cause of action correct, given that Plaintiff's retaliation  
22 claims did not address matters of public concern.  
23

24 Mr. Zahn still contends further discovery is needed. However, he  
25 has not specified what further discovery is needed. The Court will allow  
26 Mr. Zahn to specifically list what further discovery is needed , in light  
of the extensive discovery that has occurred in this lawsuit and the

1 underlying EEOC action, along with a brief explanation of why this listed  
2 discovery is necessary. Plaintiff shall file this list no later than  
3 December 16, 2005. Defendant will then have an opportunity to address  
4 whether this information has previously been provided, identifying where  
5 such could be found. With these filings in hand, the Court will then  
6 rule on whether further discovery is needed and the parameters of such.

7 For the above reasons, the Court denies in part and holds in  
8 abeyance in part Plaintiff's motion. The Court has analyzed these issues  
9 in depth several times; accordingly, the Court will not entertain another  
10 reconsideration motion (objections) on these issues.

11 **B. Defendant's Motion to Dismiss Plaintiff's Cause of Action Based on**  
12 **the Fourteenth Amendment**

13 Defendant asks the Court to dismiss Plaintiff's Fourteenth Amendment  
14 causes of action on the grounds that subject matter jurisdiction is  
15 lacking over these claims because the Fourteenth Amendment applies to  
16 state action and Congress has not consented to the federal government  
17 being sued for Fourteenth Amendment violations and adequate statutory  
18 Civil Service Reform Act procedures exist for dealing with Mr. Zahn's  
19 claims.  
20

21 The Court agrees Mr. Zahn may not seek relief under the Fourteenth  
22 Amendment given that his employer was the federal government, not a  
23 state. See *Merrit v. Mackey*, 827 F.2d 1368 (9th Cir. 1977); *Taylor v.*  
24 *United States*, 320 F.3d 843, 846 (9th Cir. 1963). In addition, Plaintiff  
25 did not list individual government employees acting in their individual  
26 capacity as defendants and, therefore, a *Bivens* action does not lie. See

1 *Holloman v. Watt*, 708 F.2d 1399, 1401-02 (9th Cir. 1984) (citing *Bivens*  
2 *v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S.  
3 388, 397 (1971)). For these reasons, the Court grants Defendants'  
4 dismissal motion.

5 For the reasons given above, **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Objections to September 14, 2005 [sic] Order (**Ct.**  
7 **Rec. 126**) is **CONSTRUED** as a Motion to Reconsider and is **HELD IN ABEYANCE**  
8 **IN PART** (Plaintiff shall file the list of outstanding necessary discovery  
9 and reasons for such **no later than December 16, 2005**) and **DENIED IN PART**  
10 (all other aspects). Plaintiff shall not file any other  
11 objections/motions for reconsideration on the issues addressed by this  
12 Order.  
13

14 2. Defendant's Motion to Dismiss Plaintiff's Cause of Action Based  
15 on the Fourteenth Amendment (**Ct. Rec. 129**) is **GRANTED**.

16 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
17 this Order and provide copies to counsel and Plaintiff.  
18

19 **DATED** this 22<sup>nd</sup> day of November, 2005.

20  
21 S/ Edward F. Shea  
22 EDWARD F. SHEA  
United States District Judge

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